No. 13672.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY J. COFFMAN,

Appellant,

vs.

COBRA MANUFACTURING COMPANY,

Appellee.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

TEXTBOOKS

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Appellant Harry J. Coffman, respectfully submits herewith his brief in reply to the answering brief of Appellee herein.

I.

The Order of the Referee Did Not Constitute a Valid Judgment for the Payment of Money Which Was Enforcible by Execution.

A.

At page 24 of its brief, Cobra contends that the referee had jurisdiction to make the order finding that Aircraft Company was indebted to Cobra in the sum of $6,254.25, and argues that the cases cited by the appellant in his brief at page 14 denying such jurisdiction have been rejected.

An examination of the cases relied upon by Cobra discloses that its contention is without merit. These cases go no further than to hold that a referee has jurisdiction to render an affirmative judgment against a creditor who has filed a claim against a bankrupt estate upon a counterclaim asserted by the trustee, *where the counterclaim relates to the very subject matter of the creditor's claim itself.* Such were the factual situations presented in each of the cases referred to by Cobra.

This point is summarized in the recent case of *In re Solar Manufacturing Company* (C. C. A. 3), 200 F. 2d 327, 331, where the Court says, in speaking of the holdings in *Alexander v. Hillman,* 296 U. S. 222, 56 S. Ct. 254; *Florence v. Kresge* (C. C. A. 4), 93 F. 2d 784; *Columbia Foundry v. Lochner* (C. C. A. 4), 179 F. 2d 630, and *In re Nathan* (D. C. Cal.), 98 Fed. Supp. 686:

> "In Hillman, Kresge, Lockner and Nathan, as in this appeal, *the subject matter of the counterclaim arose out of the same transaction as the claim. This is important because in those circumstances, as we have above indicated, the trustee may have a summary adjudication* of the issues upon which his counterclaim depends by raising these issues in his answer to the claim."*

Floro Realty Co. v. Stem Electric Co. (C. C. A. 8), 128 F. 2d 338, cited at page 24 of Cobra's brief, is likewise subject to the same analysis. The case of *Griffin v. Vought* (C. C. A. 2), 175 F. 2d 186, cited at page 24 of Cobra's brief, is not strictly in point. There, the Court merely held that Section 57(g) of the Bankruptcy Act

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*Unless otherwise indicated, emphasis in citations has been supplied.

under which claims of a preferred creditor are disallowed until the preference had been surrendered would be applied in a plenary action by the trustee to recover the assets.

In contrast to the foregoing cases, attention is directed the case of *In re Continental Producing Co.* (D. C. Cal.), 261 Fed. 627, cited in appellant's opening brief in support of the rule of law that a referee in bankruptcy does not have jurisdiction to render an affirmative judgment upon a counterclaim filed by the trustee in an amount in excess of the creditor's claim. The Court had under consideration there, as here, a counterclaim arising out of transactions which had nothing whatsoever to do and which were unrelated to the subject matter of the original creditor's claim and in denying jurisdiction stated that the trustee

> ". . . by way of defense set up a counterclaim in the sum of $43,700.00 as for monies owing to the bankrupt from the creditor *upon an entirely disconnected transaction* . . ."

This same situation is found in the case at bar. The original claim of Aircraft Company against Cobra was in the sum of $1,808.68 and was based upon a partial assignment made by one Albert Dunkin in favor of Charles W. Rollinson as attorney for Aircraft Company of an alleged future indebtedness from Cobra to Dunkin, and upon a garnishment served upon Cobra under an attachment in an action by Aircraft Company against Dunkin [Tr. pp. 5-6].

The counterclaim which Cobra filed against Aircraft Company was based upon totally independent and disconnected transactions, namely the furnishing of services,

labor and materials to Aircraft Company between May 7, 1945, and February 6, 1946 [Tr. pp. 8-11].

Clearly, there is absent from the case at bar the factual conditions which were found to be in existence in the cases cited in Cobra's brief and which were held to justify the assumption by the referee of jurisdiction to render an affirmative judgment. Here, the counterclaim was based upon totally unrelated transactions; consequently it could not form the basis for the exercise of jurisdiction by the referee under the cited authorities.

Furthermore, the claim of Aircraft Company and the counterclaim of Cobra thereto did not constitute or involve mutual debts and credits under Section 68 of the Bankruptcy Act, as contended for by Cobra at page 5 of its brief. As indicated, Aircraft Company's claim was based upon an assignment of an alleged future indebtedness due from Cobra to Dunkin and by Dunkin assigned to Aircraft Company's attorney. The Court held, however, that there never was any such indebtedness [Tr. p. 8]. This holding is a complete answer to the contention of Cobra that there were mutual debts or credits between the parties for, as stated in *McDaniel Nat. Bank v. Bridwell* (8 Cir.), 74 F. 2d 331, 333, concerning Section 68(a) of the Bankruptcy Act:

"From the wording of this subsection it is evident that, before a creditor may enjoy the use of the set-off principle against the bankrupt's estate, two essential elements must be established: (1) *Two debts must exist, one of the creditor and one of the bankrupt's estate.* (2) *These debts must be mutual, i. e., the creditor's debt must be owed to the estate of the bankrupt, and the estate's debt must be owed to this creditor.* When these conditions are fulfilled, the statute applies with full force

and may be taken advantage of." . . . *"If such conditions are not fulfilled and the required mutuality is lacking, set-off is impossible under the statute."*

Under the foregoing principles the conclusion is inescapable that since there was no debt from Cobra to Aircraft Company, there was consequently no basis for a set-off or claim of set-off under Section 68(a) of the Bankruptcy Act.

The referee, therefore, had no jurisdiction to enter the so-called judgment against Aircraft Company, for it has been held that a set-off cannot exist under Section 68(a) of the Bankruptcy Act unless the claim and counterclaim are so connected that the establishment of one operates to reduce the other. (*Cumberland Glass Co. v. DeWitt,* 237 U. S. 447, 454, 35 S. Ct. 636.)

The contention made by Cobra that lack of jurisdiction of the referee to render the judgment against Aircraft Company is urged for the first time and on appeal is without merit, for lack of jurisdiction may be urged at any time (13 Cyc. of Fed. Proc., 3rd Ed., Sec. 59.09, p. 339).

Furthermore, attention is directed to the general objection by Coffman based upon lack of jurisdiction expressly interposed by way of his exceptions to the report and findings of the special master [Tr. p. 64], and in his application to reject the supplemental report of the special master based upon all the previous papers, records and files of the case (which include the exceptions to the original report and findings of the special master [Tr. pp. 94, 95].)

tion for the payment of a money judgment. If there is no money judgment, no jurisdiction exists to institute, conduct or render any orders in proceedings supplemental to execution (33 C. J. S., Executions, Sec. 358, pp. 660-662). And when a judgment or order is void on its face, as here, it is not *res adjudicata* and it may be attacked at any time by anyone against whom it is sought to be enforced (49 C. J. S., Judgments, Sec. 401, p. 794).

II.

The Special Master Did Not Have Jurisdiction and Did Not Possess Any Power to Determine nor Was He Justified in Finding That Coffman's Denial of the Claimed Indebtedness to Aircraft Company Was Fictitious and Not Made in Good Faith.

At page 30 *et seq.,* of its brief, Cobra contends that the master was justified in finding that Coffman's conduct was fraudulent and in making the supplemental report and findings and conclusions therein contained. This contention is utterly without merit when consideration is given to the provisions of California Code of Civil Procedure, Section 719, under which a court loses jurisdiction to make an order in supplementary proceedings against a third person when the indebtedness or possession of property is denied. The denial of any indebtedness to Aircraft Company by Coffman resulting from Account No. 99-6 manifestly ousted the court of jurisdiction under the controlling California decisions. See

11 Cal. Jur., Executions, Section 91, page 159; *Pacific Coast Auto Ass'n v. Superior Court,* 121 Cal. App. 664, 668, 9 P. 2d 880.

The claim made by Cobra at page 22 of its brief that there was a stipulation for rereference of the proceedings to the special master adds nothing to the argument of appellee, because, as appears from the order made upon the stipulation in open court [Tr. pp. 77-79] the special master had made no finding whatsoever as to Account No. 99-6, although such account was introduced in evidence and was before him.

The matter was merely rereferred for the purpose of a finding as to whether or not Aircraft Company was indebted to Coffman as shown on the books of Aircraft Company. The master was not thereby empowered to decide upon the validity of the indebtedness or the obligations evidenced by thet entries therein, and he took no evidence concerning the same, deeming it unnecessary [Tr. p. 93].

Furthermore, the supplemental findings made by the master as to Account No. 99-6 were attacked not only by objections for insufficiency of the evidence but also for lack of jurisdiction (incorporated by reference from objections to the original master's report [Tr. p. 36; 99-100]); by motion to reargue objections; and by objections to proposed orders [Tr. pp. 103-104; 111-112; 120].

The supplemental finding and conclusion of law with respect to Account No. 99-6 is not only void procedurally, but is unsupported by the evidence within the doctrine of *Smyth v. Barneson* (9 Cir.), 181 F. 2d 143, 144. An examination of Account No. 99-6 and Account No. 180 shows that Coffman repaid Aircraft Company for funds advanced the sum of approximately $15,000.00 in cash between November, 1945, and June, 1947.* This repudiates the claim of Cobra that Coffman was without funds.

Furthermore, Coffman's right to an offset is not based upon the testimony of witnesses. His right to an offset rests upon specific written evidence, namely, Account No. 99-6 [Tr. pp. 66-71] which was introduced in evidence before the special master, and concerning which there was no other or further oral testimony. As pointed out at page 23 of appellant's opening brief, Account No. 99-6 was *prima facie* evidence of liability from Aircraft Company to Coffman and has never been impeached by any competent, valid testimony of any kind or character whatsoever. This account and the foregoing facts involving repayments manifestly show that Coffman's denial of indebtedness to Aircraft Company was substantial, real, and was made in good faith. Clearly, the master's supplemental findings, conclusion and report with respect to Account No. 99-6 were arbitrary based upon conjecture, and without any evidentiary support whatsoever.

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*See Appendix—Schedule of Payments Made by Coffman as Shown on the Books of Aircraft Company.

III.

The Order Requiring Coffman to Make Restitution Is Void.

California Code of Civil Procedure, Section 719, is printed at the Appendix to appellant's brief. Under that statute, to which reference is hereby made, it is clear that no order can be made by a judge or referee unless there is ". . . money or property in the hands of any other person or claimed to be due from him to the judgment debtor. . . ."

It is thus the law that in proceedings supplemental to execution, the creditor must establish the facts necessary to show relief, *i. e.,* the existence of the interests sought to be reached. Unless there is a showing of money or property in the possession of the third person, no order can be made against him. (33 C. J. S., Executions, Section 385, page 706; *High v. Bank of Commerce,* 103 Cal. 525, 37 Pac. 508; *McCullough v. Clark,* 41 Cal. 298.)

The record in this case is totally devoid of any evidence whatsoever and none has been shown by appellee that Coffman possesses any money or property belonging to Aircraft Company. The special master went no further than to find that Coffman, between May 1, 1945 and June 30, 1948 appropriated funds of Aircraft Company totalling $9,240.46, that such appropriation was wrongful, and that Coffman is indebted to said Aircraft Company in said sum [Tr. pp. 52-53]. He did not find possession by Coffman of any money or property belonging to Aircraft Company.

Since neither the Court nor the special master had proof of the possession by Coffman of any property belonging to or money due to Aircraft Company which could be directed to be applied on or in satisfaction of the so-called judgment, the burden was not sustained, and consequently, there was no legal basis for the order appealed from herein under which Coffman is ordered to pay to Cobra the sum of $6,254.25 plus costs [Tr. pp. 124, 125].

A review of the hearings below clearly discloses that the special master departed from the permissible scope of a supplemental examination and converted the hearing from an asset discovery proceeding into a general civil trial. In the original report of the special master, the master states as the basis for his findings and conclusions that Coffman was a dominant stockholder of Aircraft Company and that he diverted its assets contrary to his obligations as a director [Tr. p. 91]; in the supplemental report, the special master not only held that Account No. 99-6 lacked integrity, but added that, assuming it to be legitimate, he would nevertheless find that Coffman was not entitled to the offset therein appearing as that would place him in the position of a preferred creditor [Tr. pp. 92-93].

It thus clearly appears from the report and supplemental report of the special master that the proceedings were carried on not in aid of execution as provided by law, but without jurisdiction and as a substitute for and in lieu of a civil action to set aside preferential transfers

—all in the face of Coffman's good faith denial of any obligation to Aircraft Company arising from its offsetting indebtedness to him. This is directly and expressly contrary to the law of California, both in its statute (Code of Civ. Proc., Sec. 719) and the decision of its Supreme Court. See *Wulfjen v. Dalton,* 24 Cal. 2d 878, 151 P. 2d 840.

Finally, the attempt of Cobra to sustain the *in personam* order made by the trial court requiring Coffman to pay Cobra the sum of $6,254.25 together with costs and interest [Tr. pp. 124-125], as a proper exercise of the contempt powers of the court is absolutely untenable. First, it has been expressly held that an order cast in the form used by the trial court herein is unauthorized in the absence of any evidence or a finding to show that the party to be charged possesses property or funds belonging to the judgment creditor and upon which the order can operate. (*First National Bank, etc. v. Lufcy* (8 Cir.), 34 F. 2d 417; *Boyd v. Glucklich* (8 Cir.), 116 Fed. 131.) Second, it is a prevailing rule, universally adopted, that past acts cannot be punished by the court as a contempt. (12 Am. Jur., Contempt, Sec. 61, p. 430.) Both the constitution and statutes of California prohibit imprisonment for debt, except in case of fraud. (See Const. Calif., Art. I, Sec. 15; Calif. Code of Civ. Proc., Secs. 478, 479.) This prohibition is expressly extended to and made mandatory upon federal courts by express Congressional Act. (28 U. S. C. A., Sec. 2007(a).)*

*See Appendix.

Conclusion.

We believe that we have demonstrated in this reply brief that appellee has not answered the points made by us in our opening brief demonstrating the invalidity of the order herein appealed from. We believe that we have clearly shown that there is nothing in the record herein nor in the citations and authorities submitted by appellee by which the order made by the trial court against appellant can be lawfully sustained. Upon the principles, precedents and authorities set forth in our opening brief and in this brief, it is therefore respectfully submitted that the order appealed from be reversed.

Respectfully submitted,

REYNOLDS, PAINTER & CHERNISS,
By LOUIS MILLER,
Attorneys for Appellant Harry J. Coffman.

APPENDIX.

Record of Payments Made in Cash by Coffman to Aircraft Company.

(1) Account No. 99-6 shows the following cash credit entries made by Aircraft Company in favor of Nash-Wilshire:

Date of Item	Amount
Nov. 8, 1945	$ 100.00
Nov. 12, 1945	50.00
Nov. 10, 1945	100.00
Dec. 11, 1945	460.00
Feb. 18, 1946	500.00
Feb. 26, 1946	500.00
Mar. 31, 1946	2,100.00
Apr. 30, 1946	2,200.00
Aug. 31, 1946	1,500.00
Aug. 31, 1946	300.00
Oct. 31, 1946	3,564.84
Nov. , 1946	550.00
Mar. 31, 1947	1,687.46
Mar. 31, 1947	412.02
Apr. 30, 1947	500.00
	$14,524.32

(2) Account No. 180 shows the following cash credit entry made by Aircraft Company in favor of Coffman:

Date of Item	Amount
July 31, 1946	$300.00

28 U. S. C. A., Section 2007(a) provides as follows:

"A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State."